Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

HARVEY ROBBINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHERE THE STAR GOVERNMENT WITNESS IS ABSENT DUE TO GOVERNMENT NEGLIGENCE, AND THE GOVERNMENT MAKES ONLY PERFUNCTORY EFFORTS TO LOCATE HIM, DOES USE OF THE WITNESS' FORMER TESTIMONY AT TRIAL VIOLATE THE CONFRONTATION CLAUSE AND THE FEDERAL RULES OF EVIDENCE?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, HARVEY ROBBINS, by his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit affirming his judgment and sentence, entered in these proceedings, with rehearing denied January 20, 1999.

OPINION OF THE COURT BELOW

The written opinion of the Court of Appeals for the Eleventh Circuit is included in the appendix. *United States v. Robbins*, No. 95-5541 (11th Cir. Nov. 20, 1998). [App. 1.]

JURISDICTION

The decision of the Court of Appeals was entered on Nov. 20, 1998. [App. 1.] The petition for rehearing was denied on January 20, 1999. [App. 23.] This petition is filed pursuant to Rule 13, Rules of the Supreme Court. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

APPLICABLE PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district

> wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Evidence 804(a)(5) & (b)(1) provide:

> (a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant –
>
> * * *
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
>
> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
>
> (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is not offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to

develop the testimony by direct, cross, or redirect examination.

STATEMENT OF THE CASE

This is a petition for a writ of certiorari to resolve a conflict in the circuits over what conduct by the government would allow or preclude government use of former testimony under the Constitution and the Federal Rules of Evidence. The Eleventh Circuit ruled [App. 1] that merely perfunctory efforts to locate the witness were sufficient to permit use of the former testimony. The Eleventh Circuit also ruled that the government's negligence or wrongdoing had not caused the witness' absence, even though the government provided a known flight risk with both a motive and opportunity to flee. The Eleventh Circuit's decision conflicts with decisions of this Court and at least two other federal circuits, which hold the government to a much higher standard. *See Motes v. United States*, 178 U.S. 458 (1900); *United States v. Quinn*, 901 F.2d 522 (6th Cir. 1990); *United States v. Mann*, 590 F.2d 361 (1st Cir. 1978).

Harvey Robbins, a well-respected criminal defense attorney, was indicted on March 17, 1993. He was charged with one count of conspiracy to defraud the government in violation of 18 U.S.C. § 371. The manner and means of the conspiracy and the overt acts alleged revolved around two of Mr. Robbins' former clients – one of whom was marijuana smuggler Allen Garbett. The indictment alleged that Mr. Robbins assisted these clients in hiding

their illegal income from the Internal Revenue Service. *See* [App. 2.]

Mr. Robbins was first tried in December 1993. At that trial, the government's key witness was Allen Garbett. The case went to the jury, which could not reach a verdict. The case was then reset for trial in January 1995. However, the trial was continued because on the first day Mr. Robbins, who suffers from a severe heart condition, collapsed in the courtroom and was hospitalized. *See* [App. 1 n.1.]

Allen Garbett had a history of fleeing to avoid arrest and violating parole. Once, while already a fugitive, he jumped out a third story window in an effort to escape. Unfortunately for Garbett, he broke both his ankles and was captured. At the time of Mr. Robbins' first trial in December 1993, Garbett was again in custody awaiting a hearing on another parole violation.

Although the government knew Garbett was a risk for flight, after he testified at Mr. Robbins' first trial, the government released Garbett early from prison. Garbett was placed in Riverside Community Correction Center, a government halfway house. Not surprisingly, Garbett failed a drug test, thereby violating his parole yet again. [App. 9, 41.]

On November 22, 1994, Deputy United States Marshal John Blount was instructed to pick up Garbett from Riverside because of the failed drug test. Rather than immediately arresting Garbett, Deputy Blount notified an employee of the Riverside that Garbett would be arrested the following day. A Riverside employee then passed this information on to Garbett by calling him at work. *See* [App. 9, 41-42.]

The government admitted that it was "babysitting" Garbett. From Garbett's past history, the government knew that he was a flight risk. Yet, not only did government agents inform Garbett that he failed his drug test, but they actually warned him that he would be arrested and sent back to prison the next day. True to form, Garbett fled.

The next day, Deputy Blount was advised that Garbett had not returned to Riverside the previous night. [App. 42.] That day, Deputy Blount visited Garbett's workplace. Deputy Blount was informed that Garbett did not return to work the previous day. [App. 43.] One of Garbett's co-workers gave Deputy Blount Garbett's beeper number. However, rather than arrange for a trap to be set for Garbett using his beeper number, Deputy Blount simply asked that Garbett be paged. Garbett returned the page and was told by a co-worker that "they are here and looking for you." Garbett hung up. Deputy Blount then paged Garbett again, and when Garbett returned the call Deputy Blount tried unsuccessfully to persuade Garbett to turn himself in. [App. 10, 43-44, 52.]

Interestingly, during the course of that day, Deputy Blount received "numerous" calls from Garbett. At no time did the government even attempt to trace any of Garbett's calls or otherwise ascertain his location by using his beeper number. Several weeks later, an attempt was made to trace the beeper. By that time, of course, Garbett knew the authorities had his beeper number and did not return the page. The only additional efforts made by Deputy Blount to locate Garbett were to spend the day

on Miami Beach "looking for Al," visiting bars and showing Garbett's photograph, and visiting Garbett's sister's vacant house. *See* [App. 11, 43-46, 53.]

From November 1994 until at least January 1995, the United States Attorney's Office and other governmental agencies were in telephone contact with Garbett. Indeed, Garbett called the U.S. Attorney's Office on a number of occasions while he was a fugitive. Nevertheless, the government did not even attempt to trace these calls to discover Garbett's whereabouts, even though Garbett was a federal fugitive and government witness when the calls occurred. *See* [App. 13.]

From January 1995, the time of the aborted retrial of Mr. Robbins, and June 1995, when the case finally proceeded to trial, the government made no serious attempts to locate Garbett. *See* [App. 12, 56.] No subpoena was even issued for him for the June 1995 trial. [App. 12, 55.] The district court even described the government's "pursuit" of Garbett during this approximately six-month period as "unenthusiastic." [App. 15.]

Just days before the June 1995 retrial, the government finally notified the defense that Garbett was a fugitive. The district court overruled the defense objections and allowed the government to read Garbett's testimony from the first trial to the jury in full. [App. 13.]

Thus, the jury had no opportunity to judge Garbett's demeanor as a witness. Moreover, allowing the government to read his former testimony prevented defense counsel from cross-examining Garbett about his activities between the first and second trial. This included his flight from Riverside and efforts by Garbett to extort money

from Mr. Robbins and his co-defendant in return for favorable testimony.

As the government admitted, Garbett was the key witness against Mr. Robbins. Other witnesses corroborated Garbett's description of his own illegal activities, not Mr. Robbins' role in those activities. Only Garbett's testimony tied Mr. Robbins in as an active part of an illegal enterprise. Similarly, the documentary evidence showed transactions occurred, but Garbett's testimony was crucial to showing those transactions were for an illegal purpose.

The jury returned a verdict of guilty. After the trial, but before sentencing, Garbett was captured. The government never notified the defense that Garbett was in custody. Moreover, the government continued to rely on Garbett's former testimony to establish tax loss attributable to the defendant for the purpose of sentencing. Mr. Robbins was sentenced to 51 months in prison and 3 years of supervised release. [App. 18-19.]

A panel of the Eleventh Circuit affirmed Mr. Robbins' judgment and sentence. The Eleventh Circuit ruled that the government's efforts satisfied the unavailability requirement for admission of former testimony. [App. 4.] The circuit court also affirmed the district court's finding that "there was no basis for holding the government responsible for the fact that Garbett absconded." [App. 4 n.2.]

REASONS FOR GRANTING THE PETITION

THERE IS A CONFLICT IN THE CIRCUITS OVER THE EFFORT TO FIND A GOVERNMENT WITNESS REQUIRED UNDER THE CONFRONTATION CLAUSE AND FEDERAL RULE OF EVIDENCE 804 BEFORE THAT WITNESS' FORMER TESTIMONY MAY BE ADMITTED.

This petition seeks a resolution of the inter-circuit conflict on the following question: What efforts by the government are required under Federal Rule of Evidence 804 and the Sixth Amendment Confrontation Clause before the government can use the former testimony of a witness. This case also seeks clarification of the type of government negligence that would preclude admission of former testimony under this Court's decision in *Motes v. United States*, 178 U.S. 458 (1900). The First and the Sixth Circuits hold that all reasonable affirmative measures that have a possibility to produce the witness must be taken before former testimony may be admitted. *See United States v. Quinn*, 901 F.2d 522 (6th Cir. 1990); *United States v. Mann*, 590 F.2d 361 (1st Cir. 1978). The Eleventh Circuit ruled that merely perfunctory efforts to locate the witness were sufficient for the government to use former testimony, even where the government gave the witness both the motive and opportunity to flee.

Under Federal Rule of Evidence 804, former testimony is admissible only if the witness is truly "unavailable." The government must demonstrate "unavailability" before a witness' former testimony may be admitted. *Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980). "A witness is not 'unavailable' for the purposes of the . . . exception to the confrontation requirement unless the prosecutorial

authorities have made a good-faith effort to obtain his presence at trial." *Id.* at 75.

The Sixth and First Circuits have ruled that "good faith" is a very high standard. *See United States v. Quinn*, 901 F.2d 522 (6th Cir. 1990); *United States v. Mann*, 590 F.2d 361 (1st Cir. 1978). In *Quinn*, the Sixth Circuit ruled that "if there is a possibility albeit remote, that affirmative measures might produce the declarant, the obligation of good faith" requires that such effort be undertaken. 901 F.2d at 527. The government in *Quinn* issued a trial subpoena for a witness who was later claimed to be unavailable. *Id.* at 524. The government even had representatives from the United States Marshal's Service attempt service. *Id.* The Marshal's Service determined that the witness had moved in with her mother and obtained the address and telephone number of the witness' mother. *Id.* at 525. The Marshals then contacted the mother but were still unable to locate the witness. *Id.* In lieu of the witness' live testimony, the trial court allowed former testimony from a suppression hearing to be read to the jury. *Id.*

On appeal, the Sixth Circuit stressed the importance of giving the jury an opportunity to judge the demeanor of the witness. *Id.* at 526, 529. The court found the government's efforts to locate the witness in that case to be "singularly unenthusiastic," and concluded that the government had not shown her to be unavailable. *Id.* at 528. The court reversed and remanded for a new trial. *Id.* at 529.

The First Circuit went even further in addressing government efforts (or lack thereof) in locating allegedly

unavailable witnesses. In *Mann*, the witness was an Australian citizen who was arrested along with the defendant for drug importation. 590 F.2d at 366. Because the witness was also a juvenile who had "mistakenly been incarcerated in the wrong prison," the government dismissed the charges against her, took her deposition, and returned her passport. *Id.* Not surprisingly, the witness left the United States never to return. *Id.*

Later, in order to secure the witness' appearance at the defendant's trial, the government contacted the consulate in Australia with an offer to pay for the witness' return to the United States. *Id.* at 367. The witness never returned and the government used her deposition testimony at trial. *Id.* The court found these efforts insufficient and reversed:

> The government did not make as vigorous an attempt to secure the presence of the witness as it would have made if it did not have the prior recorded testimony. This **relatively high good faith standard** cannot be satisfied by perfunctory efforts, if the rule is not to sanction the government's procuring depositions of witnesses, especially shaky witnesses, but then discourage attempts to bring the witness to trial so long as the government is satisfied with what is in the transcript.

Id. at 367 (emphasis added). Furthermore, the court stressed that not only had the government's attempts to procure the witness been weak, but the problem existed in the first place "because the government abused rule 15(a) by using it to enable the key witness to leave." *Id.* at 368. *See also United States v. Rothbart*, 653 F.2d 462, 466 (10th Cir. 1981) (conviction reversed where government

not only failed to make good faith effort "but cleared existing obstacles to his journey outside jurisdiction of the court by taking his deposition and releasing him from subpoena").

Similarly, in *Motes*, the government sought to introduce at trial a statement made by a witness at a preliminary hearing. The witness was not present at trial because the government inexplicably let him out of jail prior to the trial and permitted him to stay in a hotel room with his family. 178 U.S. at 471. The witness then escaped. *Id.* The government offered a reward for the witness' arrest, made a "diligent search" of the city, sent out photographs of the witness to various places, and had deputies on the lookout for him. *Id.* at 469-70. Over defense objection, the trial court allowed the former testimony of the witness to be read into evidence. This Court reversed and remanded for a new trial because

> the admission in evidence of [the witness'] statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that [the witness] was absent from the trial by the suggestion, procurement, or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the government.

Id. at 471. Thus, under this Court's precedent, if the government's negligence allows the witness to escape, the former testimony of that witness is not admissible – despite a "diligent search" for the witness.

In this case, Allen Garbett was the key witness against Mr. Robbins. He testified at Mr. Robbins' first trial

in December 1993. However, the jury in that trial could not reach a verdict. The case was reset for January 1995, but was continued because Mr. Robbins collapsed on the first day of trial and was hospitalized. The case was finally retried in June 1995.

At the time of the first trial, Allen Garbett was in prison because of a parole violation. He had previously been incarcerated and each time he was paroled he violated parole. He had also been a fugitive before. Indeed, Garbett once jumped out of a third story window, breaking both ankles, in an effort to avoid capture.

Knowing Garbett's history of flight, the government nonetheless released Garbett early from prison after he testified at Mr. Robbins' first trial. Not surprisingly, he again violated his parole. Rather than immediately arresting Garbett, a Deputy United States Marshal notified an employee of the government halfway house that he would be arresting Garbett the next day. The halfway house employee told Garbett, who fled that night. Garbett did not return either to Riverside or to his work place. [App. 41-42.]

Aside from visiting Garbett's place of work the following day, the only additional efforts made to locate Garbett were that the deputy marshal spent a day on Miami Beach visiting bars and showing Garbett's photograph, and visiting Garbett's sister's vacant house. *See* [App. 44-46, 53.] The deputy had Garbett's beeper number and received numerous phone calls from Garbett, as did the U.S. Attorney's Office. But at no time did the government attempt to trace any of Garbett's calls. No effort was made to trace using the beeper number until

weeks later. By that time, Garbett knew the authorities had his number and the beeper was shut off. [App. 11.]

Most egregious, however, is the fact that between January 1995 and the actual retrial in late June 1995, the government did *nothing* to locate Garbett – a period of approximately *six months*. All efforts, such as they were, to locate Garbett occurred before the aborted retrial in January 1995. *See* [App. 12, 56.] No subpoena was even issued for the June 1995 trial. [App. 12, 55.] The government notified the defense that Garbett was a fugitive just days before the scheduled retrial. The district court overruled defense objections and allowed the government to read Garbett's testimony from the first trial.

On appeal, the Eleventh Circuit held that "the government's pursuit of Garbett satisfied Rule 804's unavailability requirement." [App. 4.] Thus, the Eleventh Circuit ruled that looking for the fugitive witness for two days, speaking to him numerous times but at no time attempting to trace the call, and doing nothing to locate him during the six months before the trial were sufficient efforts to admit the testimony.

Yet, the government's meager efforts to locate Garbett do not even come close to the efforts found insufficient in *Quinn* and *Mann*. The Sixth and First Circuits held the government to a high good faith standard. The Eleventh Circuit, on the other hand, required only perfunctory effort by the government to locate the witness.

Further, the Eleventh Circuit's decision is contrary to this Court's decision in *Motes*. The record shows that the government released a known flight risk early from prison, permitted him to come and go from a halfway

house, informed him that he failed a drug test, and warned him that he would be arrested and sent back to prison the following day. Thus here, as in *Motes* and *Mann*, the government provided the witness with the opportunity to flee by releasing him early from custody. However, unlike this Court or the First Circuit, the Eleventh Circuit nonetheless ruled that the former testimony was properly admitted.

This Court should resolve the conflict among the circuits and clarify application of Supreme Court precedent in this area. The importance of this issue is clear. With the government routinely using the testimony of convicted felons who often receive a lighter sentence as a result of their cooperation, this is particularly likely to become a recurrent problem.

The Sixth Amendment right of confrontation exists as a recognition of the fundamental importance of compelling the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 243 (1895). The ability to personally examine and cross-examine a witness is "so important that the absence of proper confrontation at trial 'calls into question the ultimate "integrity of the fact finding process." ' " *Ohio v. Roberts*, 448 U.S. at 64 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973)). The government cannot be allowed to take advantage of the testimony of a cooperating witness, then set up a situation where the witness has a motive and opportunity to flee, make only half-hearted efforts to locate him, claim he is "unavailable" and be allowed to use his former

testimony at trial without any of the drawbacks of having the actual convicted felon on the stand.

The good faith standard as applied by the Sixth and First Circuits fairly balances the needs of the government with the rights of the accused. This petition presents an appropriate case for this Court to resolve an inter-circuit conflict over a legal issue that affects the fundamental fairness of our criminal process.

CONCLUSION

For the reasons stated above, HARVEY ROBBINS respectfully petitions this Court for a writ of certiorari.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5541

D. C. Docket No. 93-138-CR-NCR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARVEY ROBBINS,
EMANUEL B. ELFENBEIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(November 20, 1998)

Before ANDERSON, DUBINA and BLACK, Circuit Judges

PER CURIAM

Appellants Harvey Robbins and Emanuel B. Elfenbein appeal their sentence and conviction for conspiracy to impede the IRS in violation of 18 U.S.C. § 371. Appellants were tried as co-conspirators before a jury on July 28, 1995.[1] Both appellants claim on appeal that the district

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[1] In December 1993, both appellants were tried before a jury; a mistrial was declared by the district court because the jury could not reach a verdict. In January 1995, a retrial was

court erred: (1) by allowing the government to read into the record former testimony of Allen Garbett, a government witness who had absconded; and (2) by admitting financial and tax records of Robbins and his family members over Robbins' objection. In addition, appellant Robbins appeals his 51-month sentence because the district court imposed a two-level aggravating role enhancement. Appellant Elfenbein appeals the district court's denial of his severance motion.

I. FACTS

Appellant Robbins was a criminal defense attorney and appellant Elfenbein, Robbins' son-in-law, was an accountant who worked out of Robbins' office. The indictment and conviction of appellants resulted from their involvement with two convicted drug traffickers, Allen Garbett and George Baron, in money laundering and tax evasion schemes.

II. DISCUSSION

A. Appellant Elfenbein's motion for a severance

On appeal, appellant Elfenbein contends that the district court erred in not continuing the January 1995 retrial as a severed trial after Robbins became ill. Elfenbein claims that postponing his trial was inefficient, and increased his financial and emotional burden.

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scheduled and jury selection took place; however, because of appellant Robbins' poor health, the second trial was continued until June 1995. The June 1995 trial resulted in the conviction of appellants on July 28, 1995.

This court reviews a district court's denial of a motion for severance for an abuse of discretion. *United States v. Tokars*, 95 F.3d 1520, 1531 (11th Cir. 1996). Because there is a preference for joint trials of defendants who are indicted together, and because Elfenbein has failed to allege any substantial prejudice, we fail to see any abuse of discretion by the district court. *See Zafiro v. United States*, 506 U.S. 534, 537 (1993).

B. The admission of the former testimony of government witness Garbett

Determinations of admissibility of evidence are not reversed by this court unless the district court abused its discretion. *United States v. Acosta*, 769 F.2d 721, 723 (11th Cir. 1985). Federal Rule of Evidence 804(b) provides an exception for the rule against hearsay: it allows former testimony to be admitted if the witness is unavailable and "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Rule 804(a)(5) defines unavailability as a witness" to include the situation where a witness is absent and "the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means."

Both appellants contend that the district court erred in admitting into evidence the testimony of Garbett from the original trial. Appellants argue that Fed.R.Evid. 804(b)(1) was not satisfied because Garbett was not "unavailable." Before a witness is deemed unavailable, the proponent of the statement must show a "good faith

effort" to obtain his presence at trial. *United States v. Rothbart*, 653 F.2d 462, 475 (10th Cir. 1981); *United States v. Mann*, 590 F.2d 361, 367 (1st Cir. 1978); *see Ohio v. Roberts*, 100 S.Ct. 2531, 2543 (1980) (addressing "basic litmus of Sixth Amendment unavailability"). Based on the evidence in the record, we cannot conclude that the district court abused its discretion in finding that the government's overall pursuit of Garbett satisfied Rule 804's unavailability requirement.[2] Moreover, the second requirement of Rule 804(b) is satisfied because it is clear that appellants had a similar motive and opportunity to develop Garbett's testimony in the first trial.

C. The enhancement of appellant Robbins' sentence

Robbins contends the district court erred in finding that he qualified for a two-level aggravating role enhancement as an organizer, leader, manager, or supervisor of the criminal activity underlying this case.

The Guidelines provide that a sentencing court should increase a defendant's offense level by two points if he acted as an organizer, leader, manager, or supervisor in criminal activity that involved fewer than five participants and was not otherwise extensive. U.S.S.G. § 3B1.1(c). In determining a defendant's role in the offense, a sentencing court should consider the following:

---

[2] With respect to appellants' contention that the government's negligence caused Garbett to become unavailable, we affirm the district court's finding that there was no basis for holding the government responsible for the fact that Garbett absconded.

the nature of his participation in the offense; the degree to which he participated in planning and organizing the offense; the degree to which he exercised control and authority over others; the nature and scope of the illegal activity; whether he exercised decision-making authority; whether he recruited accomplices, and whether he claimed a right to a larger share of the fruits of the crime. *Id.*, comment. (n 3).

The government must prove the defendant's aggravating role by a preponderance of the evidence. *United States v. De La Rosa*, 922 F.2d 675, 680 (11th Cir. 1991). On appeal, the district court's assessment of the defendant's role is reviewed for clear error. *United States v. Jones*, 933 F.2d 1541, 1546 (11th Cir. 1991).

In challenging the PSI's recommendation that Robbins received a four-level aggravating role enhancement under 3B1.1(a), Robbins' attorney argued, *inter alia*, that the numerosity requirement was unfulfilled because Robbins had not supervised five persons:

> At best Mr. Robbins supervised his son-in-law who was the accountant. And I think the evidence could properly be interpreted to that.
>
> But he did not supervise or organize these other people, either Baron or Garbett or the people who worked for them.

However, the court did not apply the enhancement for supervising five or more participants; rather the enhancement actually applied to Robbins' required supervision of "fewer than five." Robbins' attorney's statement confirms what the evidence presented at trial established: Robbins played the role of an organizer in the conspiracy, and

supervised at least one other person (his son-in-law and accountant Elfenbein). The two-level enhancement actually applied by the court was amply supported by the evidence.

Robbins represented two large-scale drug traffickers. In this role, the record indicates that he devised and executed schemes to launder his clients' drug proceeds, such as purchasing untraceable bearer bonds and operating fake businesses. Although he obtained his clients' approval for the schemes he devised, Robbins exercised some independent decision-making authority in executing the schemes. For example, Robbins chose the securities broker he used to launder his clients' funds, and only Robbins dealt with the broker. Moreover, Robbins chose the board of Directors for one of Garbett's front corporations Karlo Enterprises. In addition, Robbins brought son-in-law Elfenbein into his illegal dealings to help plan and execute the money laundering schemes.

Because the record indicates that Robbins planned and organized the offense, exercised decision-making authority, and recruited at least one accomplice, the district court did not clearly err in enhancing Robbins' sentence.

D. The admission of appellant Robbins' and his family's personal and financial records

Both appellants argue that the district court abused its discretion under Rules 403 and 404 by admitting evidence of Robbins' and his family's personal and financial records. After careful review, including particular focus on this issue at oral argument, we readily conclude that

the evidence was relevant and probative on an appropriate issue, and that the district court did not abuse its discretion.

III. CONCLUSION

For the foregoing reasons, we find no merit in appellants' arguments discussed above. Appellants' other arguments on appeal are without merit and warrant no discussion.

The judgment of the district court is

AFFIRMED.

[p. 116] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, vs. HARVEY ROBBINS and EMANUEL ELFENBEIN, Defendants.	)	CASE NUMBER: 93-138-CR-NCR Volume 2

Transcript of proceedings before the Honorable Norman C. Roettger, Chief United States District Judge, and a jury, at Miami, Florida, on the 27th day of June, 1995.

APPEARANCES OF COUNSEL: As noted.

Court Reporter: J. Goldfarb, RPR

Proceedings recorded by mechanical stenography. Transcription produced by computer.

* * *

[p. 294] THE COURT: Well, I must say there is some evidence both ways here. Maybe it is easier if I just go back and [p. 295] summarize in a way what evidence I have on this subject of unavailability of Garbett.

And I don't write very fast. And I never did. And so my notes oftentimes are sketchier than I would like. And sometimes I like to do my findings right away because I may remember some things that I didn't jot down if I do it now.

The defense motion dangles from intriguing things about Garbett. For example, 15 year sentence in Iowa and 3 years later he is out.

It was not a guideline sentence, apparently, from the years involved, but nevertheless even before guidelines cases it seems to be beating the one-third rule by a couple of years.

However, I am baffled all the time at what seems to me to be premature release dates even under the guidelines. And I used to be constantly baffled at some of the release dates before the guideline sentencing was put into effect in 87.

So I don't understand how he got out then. But nevertheless he did.

And then he broke parole a couple of times, and back in. And finally he is at Riverside House, a halfway house here, in November of 1994.

And he did not show up at Riverside House on November, frankly this seems to be a day off, if it was the 21st or the 22nd, whether he absconded on the 21st, I believe that is when [p. 296] it was, and he didn't show up at 11 p.m.

The project director or program director of Riverside House waited until 11:15. And when he didn't show he called the Bureau of Prisons to advise them.

The next day they called or they notified the marshals. And that is when Mr. Blount got, one of our 2 witnesses, received the teletype from the Bureau of Prisons about arresting Al Garbett.

Apparently, although it is not crystal clear, Mr. Garbett who was working at this Intercontinental Rental Car Agency was advised by a fellow employee there that the marshals were present looking for him because of a failed urine test and that that was what promoted the absconding.

Mr. Blount's testimony was that on the 23rd he went to Intercontinental, on the 23rd of November, to the rental car agency.

And Garbett had been there November 22. But from 3 o'clock on he was not there.

Garbett called Intercontinental and Blount told him, that was on the 23rd obviously, to turn himself in. And Garbett said he wanted to talk with AUSA White.

And Mr. White, our prosecutor here, hold him that, the same thing that Blount had told Garbett, to go ahead and turn yourself in.

5 minutes later Garbett called back again to [p. 297] Intercontinental and told Blount he wasn't sure he wanted to do that. And he obviously did not do that.

And nobody that we are aware of from the evidence here has seen Garbett since.

Blount immediately took off for Miami Beach on a tip that Garbett was at a Howard Johnson's. And there are only 2 in Miami Beach. And they were checking them both out and could not find him.

Blount left cards at, with Al's sister and at Starr's place and at the bars where she danced, his former wife. And Mr. Blount was fairly emphatic that Al still carries a

torch for her, if I may use that old phrase, and asking them to call.

And none of these people ever returned the call. And I can't imagine why they would in the first place.

And a lady named Alicia Weiss who I think is the daughter of whoever owned Intercontinental Rental Car Agency said that Al was involved with a fellow employee there named Miriam Perez. But Ms. Perez denied it.

And he gets a tip from somebody in Key Largo that Al frequents the Clevelander bar in Miami Beach particularly on aturday [sic] evening, but Al didn't show. And apparently they only did this one time.

And then I think Blount got transferred out of the fugitive section.

[p. 298] They did set up a beeper triangle trap once but by then Al had turned his beeper off and it was unsuccessful.

And Blount was last on the case in early January. He had gone to several bars in Miami Beach, and that doesn't sound like tough investigative work, near the Clevelander, and Al occasionally frequented those bars, with no result.

And so there was a lot of activity prior to our previous trial date in early January, the 4th, I think. And in fact Searle and another agent, Mr. Searle is an IRS special agent out of Orlando, and he went by that Riverside House on January third on their way into town for the trial, I guess, and learned that Garbett had absconded.

And they had a subpoena with them when they went to Riverside House. And they had tried to call or check with Starr again and Suzanne Voit in an effort to find Al.

There was a good bit of activity, as I said, before the first trial date in January. There has been very little, and I am being charitable, since then.

And it strikes me that there was a good bit of attention, contrary to Mr. Black's assertion, to locating Mr. Garbett on the part of both Mr. Blount and Mr. Searle back before the first trial.

But since then, because they apparently have run out of places to look, the government has fallen back on the NCIC and are waiting for Mr. Garbett who apparently according to Mr. [p. 299] Garvin is a terrible driver or an unlucky one, waiting for him to run a stop sign in Mingo Junction, Ohio or Nebraska or some place and assume that they will have him picked up there.

No subpoena has been issued for this trial, although I am not sure where they would serve it. Apparently the government's theory is, we don't know where to serve it. Therefore we don't have it issued. And in some ways it is hard to argue with that.

Searle has talked with Cholakis, Mr. Cholakis and Ms. Voit in Wisconsin, talked with both of them in the last two weeks to see if they have heard anything about the presence of Al Garbett, although there is not really a lot of evidence of their recent communication between themselves and Mr. Garbett, not in the last several years.

As of right now he very definitely is unavailable under rule 804A. I do not find any basis for holding that it is the government's fault that Mr. Garbett absconded.

I think Mr. Garbett has done what people tend to do when it is not in their interest to stay where they are supposed to be. And if it is more of an inducement to leave, they leave.

And I don't think that that is the government's fault enough that it somehow should bar them from using the testimony from the first trial.

I also found that there seemed to be a fair amount of [p. 300] trust involved between government agents and the U.S. Attorney's office and Mr. Garbett in the fact that Garbett wanted to talk with Mr. White and he called and he discussed this thing with Blount first and then told him he wanted to talk with Mr. White. And then after he talked with White he calls Blount back.

And I got the distinct feeling from the testimony that they really expected that Garbett was going to turn himself in or at least that he would not flee on them and would somehow stay in touch.

Obviously they were wrong. People tend to do what is in their best interests or what they perceive to be in their best interests regardless of past friendships, relationships, et cetera.

Now the big question I find, and I don't see a difficulty as far as the government crossing the hurdle on the 804A, and then when I get to the testimony, 804B1, I don't see a problem in there to preclude the use of that former testimony because the only thing that I can see that

happened since the absconding is nothing that can be attacked on cross examination.

The only thing that can be attacked as a part or a sort of impeachment is the fact that he absconded. And with Garbett's record, from the way I read it in the defense motion, it is so sorry as far as being reliable and law abiding that [p. 301] one more abscond, and I am not sure what the word is, one more absconding himself from where he should be in violation of law is just kind of like one more lump of coal on a pile of coal, guilding the lily in a negative way, nothing earth shaking about that.

And I don't think this case is going to rise or fall on whether or not the defense can ask one more question about, or a question of Garbett about absconding one more time.

As I recall there was a series of one hundred 59, an unrebutted assertion of one hundred 59 pages of cross examination out of, I think over half of it or about half of the pages of examination.

And I can't imagine what new the government could come up with on Garbett in their direct or redirect. And I can't imagine what new can be come up with by the defense on cross on the former testimony.

I have really not heard any assertion other than the fact that they could ask him an impeaching question about, Mr. Garbett, you have absconded one more time, haven't you? And I have already expressed my comments on that.

So it would seem to me that there is no reason not to permit the use of the former testimony, the testimony at the former trial, the trial before Judge Highsmith.

Now, I am not real thrilled about the government's lack of pursuit of Mr. Garbett between January and now. [p. 302] It does fall under the unenthusiastic heading.

And perhaps the 11th Circuit would hold that it is a fatal flaw. But I don't at this point and only because I find that their efforts were very enthusiastic in late November and December of 94 and the first week or so of January, 95, before we had to have a mistrial in the January trial date.

It is an interesting question, as these questions always seem to be. And with that I will swear in the jury tomorrow morning.

And I put the burden on the government to remind me that I have got to do that first thing.

* * *

UNITED STATES DISTRICT COURT

SOUTHERN District of FLORIDA

UNITED STATES OF AMERICA

V.

HARVEY ROBBINS
Marshal #46846-004

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Dec. 27, 1995)

Case Number:
93-138-CR-ROETTGER

A.U.S.A. – Patrick White
Roy Black, Esq. 201 South Biscayne Blvd. #1300
Miami, FL 33131-6421
Defendant's Attorney

THE DEFENDANT:

[XX] pleaded guilty to count(s) _____.
[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:§371	Conspiracy to impede Internal Revenue Service	3/29/93	1

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[XX] It is ordered that the defendant shall pay a special assessment of $ 50.00 , for count(s) 1 , which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 128-14-3817

Defendant's Date of Birth: 12/9/26

Defendant's Mailing Address:
11111 Biscayne Blvd.
#2052
Miami, FL 33161

Defendant's Residence Address:

December 4, 1995
Date of Imposition of Sentence

/s/ Norman C. Roettger
Signature of Judicial Officer

NORMAN C. ROETTGER
CHIEF UNITED STATES
DISTRICT COURT JUDGE
Name & Title of Judicial Officer

27 Dec. 1995
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 51 Months.

Defendant to surrender upon completion of appeal.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years .

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[XX] The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

[XX] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[XX] The defendant shall not possess a firearm or destructive device.

Defendant is fined the sum of $50,000.00 to be paid to the U.S. Courts, Clerk's Office, 301 North Miami Avenue #150, Miami, FL 33128-7788. Fine to be paid immediately. Further Ordered that as a Special condition of Supervised release, the defendant shall make full & complete disclosure of his personal & business finances/financial records as requested by the probation officer. Defendany [sic] shall submit to an audit of his personal & business financial record as requested by the prbation [sic] officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5541

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARVEY ROBBINS,
EMANUEL B. ELFENBEIN,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Jan. 20, 1999)

BEFORE: ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants is DENIED.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson, III
UNITED STATES CIRCUIT JUDGE

[p. 116] IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff, vs. HARVEY ROBBINS and EMANUEL ELFENBEIN, Defendants.	)	CASE NUMBER: 93-138-CR-NCR Volume 2

Transcript of proceedings before the Honorable Norman C. Roettger, Chief United States District Judge, and a jury, at Miami, Florida, on the 27th day of June, 1995.

APPEARANCES OF COUNSEL: As noted.

Court Reporter: J. Goldfarb, RPR

Proceedings recorded by mechanical stenography. Transcription produced by computer.

* * *

[p. 245] IRS Agent Searle.

THE COURT: Raise your right hand, sir.

(The witness, RONALD SEARLE, is duly sworn)

THE COURT: Have a seat, please, sir.

Please tell us your full name and your occupation. And spell your last name, sir.

THE WITNESS: My name is Ronald Searle, S-E-A-R-L-E. I am a special agent with the Internal Revenue Service in Orlando, Florida.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. WHITE:

Q. Agent Searle, are you familiar with the case of United States of America versus Harvey Robbins and Emanuel Elfenbein?

A. Yes, I am.

Q. Did you have any responsibility with respect to this matter?

A. Yes, I did.

Q. And could you just briefly tell us what your responsibility is?

A. Basically I started the case to assist the case agent which is David Leoce in this case, helping to make sure that the witnesses are aware of the trial date and helping them with their travel arrangements, that type of thing.

Q. Are you familiar with a witness named Allen Garbett?

[p. 246] A. Yes, I am.

Q. And did you assist Mr. Garbett in any way with respect to preparation for the January, 19, no, I am sorry, January 4, trial date in this particular court?

A. We attempted to.

Prior to that time when I was still in my office in Orlando I know there were some phone conversations between my office and Mr. Garbett.

Mainly I remember that he was interested in making sure that we didn't still have his suit from the first trial. I know he was looking for that. And he was asking us to mail that down to him.

And when he would call in we would let him know when the next trial date was, let him know that there were no up dates, no changes, that type of thing.

Q. Did there come a time when Mr. Garbett was released from custody of the Prison Bureau?

A. Yes.

Q. And was your office able to keep in touch with him as to where he was located then?

A. Yes. As a matter of fact Al called our office and gave us the address of the Riverside House, the phone number, who the program director was, all of his information there so that we would be able to get hold of him to serve his subpoena and to make sure he knew when to be here for trial.

[p. 247] Q. What is the Riverside House?

A. It is a halfway house here in Miami.

Q. Do you have the specific location of that halfway house?

A. I do. I have been there.

I don't know that I have the address here with me now. I don't know it off the top of my head.

Q. Did you have the occasion to go there?

A. Yes.

Q. And for what purpose did you go there?

A. Well, when David and I came down to prepare for the January 4 trial, that is when we learned that Al Garbett may be a fugitive or may have left the halfway house.

So it was at that time that I went to the Riverside House with Agent Leoce and just to really do a preliminary examination.

We looked at the visitor log to see if any of Al's associates had been there to visit him. I believe we went back to July, up until the time that had he absconded, which was all the records that they had.

We talked with the program director and the person that was on duty there at the time. Nobody knew of any of his associates.

And we basically just got a little background on Al.

The way it turned out is he just didn't come back from work that night. He was 15 minutes late. He was supposed to [p. 248] report in at 11 p.m.

At 11:15 the program director made note of that and called the Bureau of Prisons.

Q. Now, did you ever make, did you have a subpoena at any time for Mr. Garbett to serve to him with respect to that January trial date?

A. Yes. He originally agreed to accept it by mail which was normal in this case. All the witnesses have been cooperative and had no problem accepting it by mail.

However, that piece of mail came back to us as undeliverable because that person no longer lived there.

And it turned out it was that program director at Riverside House who sent that back to us when she got it.

Q. Now, did you ever, when you attempted – you made attempts to find Mr. Garbett?

A. Yes. We had the subpoena with us when we went to the Riverside House as well.

Q. And did you do anything else after your – when you were unsuccessful in trying to locate him did you go to his place of employment?

A. Yes.

Q. Can you tell us where that is?

A. As you were saying earlier, it is on LeJuene Road over by the airport, the Intercontinental Car Rental Agency.

We went there. And I talked to Mr. Ricardo there, [p. 249] basically just interviewed him a little bit about Al, when was the last time he saw him, is he due to come back in for a pay check.

And I believe that is the time I got his beeper number from that gentleman.

And then he related to me what was happening with the United States Marshals, that they had been looking for him, that the marshals were by Intercontinental, that they set up a deal where they had Intercontinental page Al and when he returned the page, the person that

answered the phone, that the person said the marshals are here looking for you.

And I guess that is when Al became a little nervous and jumpy.

THE COURT: Intercontinental what?

THE WITNESS: Rental Car Agency.

THE COURT: All right.

BY MR. WHITE:

Q. Have you made any other efforts to try and locate Mr. Al Garbett?

A. Any associates of his that we knew we tried to contact and or we did contact to see if they had heard from Al.

The main thing we were focusing on was his ex wife Starr Garbett who we know Al has had a continuous obsession with.

Through discussions with him in the past we know that [p. 250] he was still very much infatuated with her. We were quite certain that he might try to make some type of contact with her.

We made some attempts back then and recently to get a hold of Starr and her mother and nothing has come of that. We don't know if he has been in contact with her or not.

THE COURT: Was he working at the Intercontinental Car Rental Agency?

THE WITNESS: Yes, sir. That is where he was working that night that he absconded.

MR. WHITE: Nothing further.

THE COURT: When did you go out to the Riverside House with the subpoena in your pocket?

THE WITNESS: That would have been January third, 1995.

THE COURT: Okay.

THE WITNESS: We had just gotten into town from Orlando at that point.

THE COURT: Cross examination.

MR. BLACK: Yes, sir.

CROSS EXAMINATION

BY MR. BLACK:

Q. When is it that Mr. Garbett, what date is it that he didn't show up at Riverside House?

A. I believe that was November 21. Something like that.

[p. 251] Q. Okay.

A. We didn't find out about it until we got to Miami.

Q. Was there any conversations after November 21, with Mr. Garbett?

A. Not that I can recall, no, other than the time he called Mr. White's office.

Q. And when was that? Do you know what date that was?

A. I don't know the exact date, no.

Q. Mr. White had said earlier when he was giving the proffer that he would call in to discuss Mr. Robbins medical problem.

Do you know about that?

A. I don't know about that. It wasn't usually myself that talked with him on the telephone.

Q. I was just wondering if he absconded some time in November, and Mr. Robbins medical problem was in the middle of December.

I am just wondering if you knew when these calls occurred where Mr. Garbett was asking about Mr. Robbins medical problem.

A. I really don't know anything about that.

Q. And which associates of his have you talked to about him?

A. I talked with Suzanne Voit who is another person that he was close with during the times that he used to live and run here in Miami. He had not been in any contact with her.

And also she was, when she was in Miami in preparation for this trial, she showed up to testify. She had been in [p. 252] contact with some other people who knew Al as well and they hadn't heard from Al either.

Those names I do not know, though.

Q. Other than Suzanne Voit was there anyone else?

A. We asked Leon-Cholakis the former brother in law of Mr. Garbett if he had heard from him. And Mr. Garbett had not been in contact with him either.

And I believe, yes, we made contact with his employer, a good friend of his who was there, Ricardo Rojas.

Q. So the associates you are talking about are people who are witnesses in this case?

A. Yes. Well, and we also tried to get hold of Starr Garbett as well.

Q. Did you have any conversations with Starr Garbett?

A. No, didn't have the good fortune of being and I believe to catch up with her.

Q. And had he been stalking her?

A. Well, I don't know. I cannot say what he does in his spare time.

But there is no doubt when you talked to Al that he was still very much in love with this woman.

Q. Okay. Thank you, Special Agent Searle.

A. Thank you.

MR. WHITE: One follow up question if I may, your Honor.

[p. 253] MR. GARVIN: Your Honor, if I may.

THE COURT: Very well.

CROSS EXAMINATION

BY MR. GARVIN:

Q. Good afternoon, Agent Searle.

A. Good afternoon.

Q. Agent Searle, could you please tell the Court where Suzanne Voit resided in January?

THE COURT: How do you spell that name?

THE WITNESS: V-O-I-T.

THE COURT: Okay.

THE WITNESS: She was in Wisconsin at that time.

BY MR. GARVIN:

Q. And prior to – how long had she lived in Wisconsin, sir?

A. I am purely guessing. But I am guessing a few months prior to that time.

That is a total guess. I really don't know.

Q. Would it also be true that she lived in Hawaii before Wisconsin?

A. That is true.

Q. And she lived there for several years.

A. I believe so.

Q. Sir, would it be fair to say then that you asked Suzanne Voit if she had seen Al Garbett when she arrived here in Miami from Wisconsin?

[p. 254] A. Could you repeat that, please?

Q. Yes, sir.

Would it has [sic] been fair to say that you asked Suzanne Voit if she had seen Al Garbett when she arrived here in Miami for the trial in January from Wisconsin?

A. Yes, I asked her if she had seen him or if any of their mutual friends had seen him or heard from him.

Q. And even though you did realize that she was in the State of Wisconsin, right?

A. At what time?

Q. Immediately prior to you asking her if she had seen Al.

A. Yes.

Q. Between the date of – I believe your testimony was that the last time Al Garbett reported in was November 21, 1995 or 1994.

Is that correct, sir?

A. At the Riverside House, yes.

Q. And the first time that you went to his place of employment was January third, 1995?

A. No. That was December 13, 1994.

THE COURT: Wait a minute.

THE WITNESS: Wait a minute. I am sorry.

THE COURT: What happened on –

THE WITNESS: That is when the marshals were there. I went January third, 1995.

[p. 255] THE COURT: What happened on December 13?

THE WITNESS: That is when I found out that the, that is when I found out the date the marshals started looking for him or the –

THE COURT: Wait a minute. I made some notes earlier and I want to be sure that I am reading this correctly.

THE WITNESS: That is when I went to Intercontinental, not Riverside. I am sorry. I got them confused.

BY MR. GARVIN:

Q. Now I am confused.

A. Okay.

Q. Which of the two days did you go to Intercontinental?

A. Intercontinental I went December 13, 1994.

Q. And on January third, 1995, where did you go?

A. Riverside House.

Q. So you went to Riverside House after you went to Intercontinental?

A. Well, you have to remember that we are from Orlando. And I just happened to be in toen [sic] with Agent Leoce probably for that one day, just to do some preparatory work here for trial.

And if I am not mistaken, that was the first we really learned that Al Garbett may be missing. We weren't even

sure of it at that time. And that is when we went to [p. 256] Intercontinental.

And I believe it was even on the way to the airport. I remember that we were hurrying around to get to the airport after talking to those people.

Q. That was December 13?

A. That is correct. That was my mistake. I am sorry.

Q. Do you remember when the marshals began to look for Mr. Garbett, sir?

A. I believe immediately after they were contacted by Bureau of Prisons.

Q. Okay.

A. Which was as soon as possible after he absconded.

Q. After learning on December 13 that it was possible that Al Garbett had failed to report and was missing, what if anything did you do?

A. On December 13?

Q. Yes, sir.

A. That is when we went to Intercontinental.

We didn't have a lot of time before going back to Orlando. But it was also on that day that I learned that the U.S. Marshals were actively looking for Mr. Garbett.

And at that point I became concerned. I didn't want to cross any paths or mess up anything that the U.S. Marshals had going at that time.

Q. Would it be fair to say, sir, that you did not do anything [p. 257] between the date of December 13 and January third, that you took the back seat and permitted the U.S. Marshal to do whatever they were doing with regard to Al Garbett?

A. Unless there were some attempted phone calls at that time.

Really we were up in Orlando at that time. And there wasn't much we could do from there.

And you are right. The U.S. Marshals were on the case at that time.

MR. GARVIN: I have no further questions of this witness, your Honor.

THE COURT: Let me be sure I have the facts straight.

November 21, 1994, was that when Al Garbett absconded?

THE WITNESS: That is the date I recall, yes. On or about that time.

THE COURT: And he didn't show up at 11 o'clock when he was supposed to.

THE WITNESS: He was supposed to report back at Riverside House at 11 p.m. At 11:15 it was noted that he hadn't come back. And that is when the program director at Riverside contacted the Bureau of Prisons.

THE COURT: Some time between there and December 13 do you know whether the Bureau of Prisons contacted the marshals or not?

THE WITNESS: I am sure they did because I think the [p. 258] marshals were on the case that day or the next morning.

But I just didn't know about it. I didn't know about it at that time.

THE COURT: Did you have a contact person in the marshals service about that?

THE WITNESS: Yes. United States Marshal John Blount was who I learned was trying to find Al Garbett.

THE COURT: John –

THE WITNESS: Blount.

THE COURT: Blount. Spell that.

THE WITNESS: B-L-O-U-N-T.

THE COURT: Very well. Thank you.

MR. WHITE: Just a few questions, your Honor.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. WHITE:

Q. Special Agent, locating prisoners, is that part of your main job responsible?

A. No.

Q. And when you stated that you talked to Ms. Voit to find out if she had heard anything about Al Garbett,

were you aware of the fact that she and Al Garbett had a number of mutual friends here in the Miami area?

A. Well, she happened to mention it. And I know while she was waiting here to testify she met with some friends.

[p. 259] And I just thought of it at the time to ask her if any one of them had heard from Al. And that is when she told me that she did ask and nobody had been contacted by Al.

Q. During the time that you were working on this particular case, are you aware of the fact that there were a number of trial dates set?

A. Yes, sir.

Q. And you are aware of the fact that a number of them have been continued because of health problems of Mr. Robbins?

A. Yes.

Q. And when you talked to witnesses would you tell them about the reasons that the case was being continued?

A. Sometimes yes, sometimes no. I had to make a lot of phone calls.

Q. And when you talked to Mr. Al Garbett, did you let him know that Mr. Robbins was having medical problems and that was the reason why we weren't going to trial?

A. I don't believe I personally ever had that conversation with Al.

The 1 or 2 times that I ever talked to him I would let him know that the trial date was set or what it was at that time.

Q. Any doubt in your mind that Al Garbett knew when the trial date was to occur?

A. There is absolutely no doubt.

[p. 260] MR. WHITE: Nothing further.

At this time, your Honor, we would like to call U.S. Marshal Mr. Blount.

THE COURT: Very well.

(The witness, JOHN T. BLOUNT, is duly sworn)

THE COURT: Have a seat, please, sir.

Please tell us your full name and your occupation and spell your last name.

THE WITNESS: John T. Blount, Deputy United States Marshal.

DIRECT EXAMINATION

BY MR. WHITE:

Q. Deputy Marshal Blount, what are your basic job duties with the U.S. Marshals office?

A. Courtroom security, transportation of federal prisoners, witness protection and fugitive investigation and apprehension.

Q. With respect to fugitive investigation, are you familiar with the name Al Garbett?

A. Yes, I am.

Q. And did there come a time when you were assigned to that case concerning Al Garbett?

A. Yes.

Q. Do you recall when that occurred?

A. Yes, I do.

Q. When?

[p. 261] A. 11/22/94.

Q. And could you tell us the circumstances surrounding that assignment for that case, what caused it?

A. On the 22nd of November while processing another individual that we had just arrested we received information from the Bureau of Prisons through teletype requesting us to contact staff members at the Riverside Community Center which is a halfway house located in downtown Miami for the purposes of arresting Allen Garbett for dirty urine.

Q. And what did you do?

A. After I completed the paperwork on the other individual I placed a call to Riverside Halfway House and made arrangements with the staff members to come pick up Allen Garbett the following morning between 8 a.m. and 10 p.m. [sic], which is very routine.

Q. What does it mean when you say you made arrangements?

A. If it had occurred earlier during the day we might just go out right at that point and arrest the individual if the individual is out working. Or we may go to the place of employment.

In this circumstance it was at the end of the day, at the end of my shift and my partner's shift. So we made arrangements to pick up Allen Garbett the following morning between the hours of 8 and 10 a.m.

Q. So did you actually go to his place of employment?

[p. 262] A. The following day we did.

When I came to the office the following day the first thing I intended to do was to go to the halfway house and pick up Allen Garbett.

But I received a phone call stating that Allen Garbett had not returned to, he never returned to the halfway house on the previous evening.

Q. What occurred then?

A. At that point we began an investigation immediately. And the first thing we did was we went to his place of employment which was Intercontinental Rental Car Agency located on LeJuene Road by the airport.

Q. And could you tell us who you talked to there and what occurred?

A. Yes. When he entered –

THE COURT: What date was this?

THE WITNESS: This was the 22nd, 11/22.

THE COURT: When did you get the teletype?

THE WITNESS: We got the teletype on 11/22.

THE COURT: Okay.

THE WITNESS: I arrived at the rental car agency, went inside, made a request as to the whereabouts of Allen Garbett. I identified myself as a deputy United States Marshal.

And they told me that he did show up at work on the [p. 263] previous day but did not come back. In other words, he was there during the early hours of the 22nd but did not show up after 3 o'clock. And his whereabouts were unknown at that time to them.

I then asked if they had any way of getting in touch with him. And they responded they had a beeper number. And I asked them to page Allen Garbett.

They then made a page to Allen Garbett. The phone rang. An individual by the name of Ricardo picked up the phone. It was Allen Garbett.

He said, they are here and they are looking for you. At that point he hung up the phone.

I had him paged again. He called back. And then I picked up the phone and I spoke with Allen Garbett.

BY MR. WHITE:

Q. And could you tell us what you said to him and what he said to you?

A. Well, I advised him who I was and what my intentions were and persuaded him to turn himself in.

At that point he said that he would like to turn himself in but he refused to turn himself in. He said that he would think about it and get back with me.

I continued to try to persuade him to turn himself in. And then he said, I want to call Patrick White.

Q. That being me?

[p. 264] A. Yes.

Q. What happened then?

A. I told him to go ahead and call. I said that you would probably give him the same advice that I was giving him.

So he hung up. And I waited approximately 5 minutes. And he called back.

Q. And can you tell us about that conversation?

A. He told me that you had indeed persuaded him to turn himself in, that you had basically told him the same thing that I had told him.

He said that he would think about it and. At that point he hung up. But then later he called again.

Q. Did you have any idea at that time where he was located?

A. At that time I had no idea where he was located.

Q. Did there come a time when you found out where he was located?

A. there [sic] came a time when co-workers told me that they believed him to be at a Howard Johnson's hotel

on Miami Beach. There are only 2 Howard Johnson hotels on Miami Beach.

Q. Let me take you back to your presence at his place of employment.

Were there any other phone calls after that second phone call?

A. I think there were a total of 4 phone calls.

Q. You told us about 2. Could you tell us about the third and [p. 265] the 4th, if you recall?

A. Well, as I recall, the other phone calls, it was just more going back and forth, me trying to persuade him to come in and him telling me that, basically that I am not going do that much more time for the escape and this and that.

And I was unsuccessful in trying to get him to turn himself in.

Q. Now, what efforts did you make to locate Al Garbett after that?

A. Well, immediately after that we combed Miami Beach, the Miami Beach area, which Al is known to frequent. He has been arrested by the marshals service before.

We went to the Howard Johnson hotel. We looked at the registry. We interviewed people there. We showed photographs at that point.

We spent the day on Miami Beach looking for Al Garbett.

THE COURT: And which day was this?

THE WITNESS: That would have been on the 23rd, the day that we found out that he absconded.

BY MR. WHITE:

Q. Now, did you ever get any leads as to where Mr. Garbett might have been?

A. Yes.

Q. Can you tell us about those?

[p. 266] A. Well, we, for instance, we went to his sister's house. We went to her house in the hopes that we might find Allen Garbett at that house.

We found that house empty and vacant at that time. And a neighbor came out and told us that he had been by there in the past. However, they hadn't seen him for several months, that he comes by when he needs money.

We left business cards and asked if they would call if they were to see Al Garbett around. And they said that they surely would, that he is a pain, end quote.

Q. Did you ever get a return on any of those calls?

A. No. And we also tried to locate his former wife Starr who is an exotic dancer somewhere in the South Florida area. She has worked in several bars.

We went to several bars and showed his photograph. Many people recognized Allen as the individual that used to go out with Starr.

In addition to all of this, there was another individual by the name of Charles Gallan. Charles had reportedly

tried to convince Allen Garbett to get into the electronics business.

I then went to Gallan. And he didn't know his whereabouts.

The Eliza Weiss, daughter of the Intercontinental Rental Car Agency, stated to me that she believed Allen to be [p. 267] romantically involved with a co-worker at Intercontinental Rent a Car. Her name is Miriam Perez.

We conducted various surveillances on Ms. Perez in the hopes that she would lead us to Allen Garbett. That never did happen.

We eventually interviewed Miriam Perez who stated that she has not had any contact with Allen Garbett since he left.

I would receive phone calls periodically from associates which would –

Q. And what period were you receiving those calls initially?

A. I received those calls from 11/23 until I stopped working on the case because I was moved to another unit.

Q. Okay.

A. Until early January.

Q. Did you have any informants that you used to locate the subject?

A. Yes.

Q. And could you tell us about that?

A. Yes. An individual was arrested in Key Largo who I would prefer to remain anonymous.

The individual stated to a deputy marshal in the keys while in transport that he knew where a federal fugitive was and that a deputy United States Marshal by the name of John Blount was currently trying to locate him and that he would [p. 268] like to help and in return he would like the marshals service to contact the parole commission to put in a good word for him. And I did contact him.

Q. And what became of that?

A. He stated to me that Allen Garbett loves to frequent the Clevelander Bar on Miami Beach and is there every Saturday night.

The information that he gave was recent. We set up a surveillance. And that would have been late December.

THE COURT: What is the name of the bar?

THE WITNESS: The Clevelander.

We set up surveillance with the Miami Beach Police Department from 5 until 10 o'clock. Those were the hours that he was said to frequent the Clevelander. Allen never showed up.

In addition to that we had the individual page Allen Garbett with a code that they frequently used to use to communicate with one another. I still had Allen Garbett's pager number that he gave at the time.

He called and left a page and Allen never returned the call.

Q. Are you familiar with a beeper triangle?

A. Somewhat. You are talking about a Deanus (phonetic) trap?

Q. What is that?

A. Well, there are several ways to try to locate someone [p. 269] through, with a beeper.

One way is to plug in a one 8 hundred number that goes to the U.S. Marshals service. They will continue to page the beeper and when the individual pages back he can hear anything up to a busy signal, he can hear music, what some people refer to as elevator music.

And while he does that the call can be traced. And they can call me or another deputy and let us know where that call is being made from.

In other words, they are calling back headquarters.

Q. Was there an attempt to do that in this particular investigation?

A. Yes, there was.

Q. Tell us about that.

THE COURT: You call that a Deanus trap?

THE WITNESS: Deanus. I don't know what it stands for but that is what it is called.

They have techs that can do that, surveillance technicians that do that. And our efforts were not fruitful. The beeper had been turned off by that time.

BY MR. WHITE:

Q. Now, was anyone working with you when you were was trying to locate Al Garbett? Did you have a cohort?

A. Well, we work in teams. But my main partner at that time was Paul Smith.

[p. 270] Q. After you were assigned to another case who was the case assigned to?

A. I believe that after I left and took duties elsewhere I believe that Deputy Barry Golden inherited this case.

Q. Have you ever had occasioning to talk to Deputy Golden about this case?

A. I asked Barry Golden about the Garbett case at one point or another. And he related to me that he ended up talking with the owner of Intercontinental, Ms. Weiss, who I had only spoken with over the telephone. I dealt mostly with the daughter Eliza Weiss.

He stated that he had a conversation with her in the presence of her attorney. He stated that he had no additional information but he he did come up with a photograph of Starr.

But other than that I don't recall anything that he found out from his investigation.

Q. And do you know who the case is presently assigned to?

A. I am not sure, but I believe that it is assigned to Bob Sanchez.

MR. WHITE: One moment, your Honor.

Thank you.

THE COURT: Cross examination.

MR. BLACK: Thank you.

CROSS EXAMINATION

BY MR. BLACK:

[p. 271] Q. Deputy Blount, the last time you were on this case was sometime in early January?

A. Yes, sir.

Q. Do you remember the date?

A. My last report, I believe, was – that would have been at the time that they set up surveillance at the Clevelander.

MR. BLACK: Thank you. No further questions.

MR. GARVIN: May I inquire, your Honor?

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. GARVIN:

Q. Deputy, when you went to Intercontinental, do you recall the date of that, sir? Was that November 23?

A. Initially the very first time I went after discovering that information.

Q. And that was the day that you asked the owner to page Mr. Garbett and he returned the page.

Is that correct?

A. It wasn't the owner. That was a co-worker.

Q. All right.

A. Yes.

Q. And at that time did you know about the tracing system that you have described here today?

A. No, I did not. I learned about the tracing system through my investigation with Garbett.

[p. 272] Q. At any time during that initial meeting did you contact anyone to determine whether or not you could trace – .

A. In other words, I asked Ricardo if he had a pager number for Al Garbett. Richardo took it upon himself to page Allen Garbett. And at that point it rang.

Q. And did anybody at the marshals office on that particular day try to implement the tracer system?

A. No, not on that day.

And that is always an option. And as an investigator you can choose to make the call or you can choose to try another method.

Q. My question is when was the first time that the Deanus trap was attempted?

A. I don't recall the exact date.

Q. Would it have been after your first meeting at Intercontinental?

A. No, because I didn't work it for 6 months after my first meeting at Intercontinental.

The first meeting at Intercontinental was on 11/23. And I stopped working the case early in January. And so if I had to guess about the time of that Deanus trap, that would have been mid December.

Q. Was there ever a time that you went to the Clevelander other than the one occasion that you have described for us?

A. When I visited several bars along that same strip that the [p. 273] Clevelander is on, along the beach area is where I was told that Allen Garbett frequented that area.

So I had stopped in the Clevelander from time to time, but I never made contact.

MR. GARVIN: I have no further questions, your Honor.

THE COURT: Redirect.

MR. WHITE: Just one, your Honor.

THE COURT: Very well.

REDIRECT EXAMINATION

BY MR. WHITE:

Q. Deputy, having worked on this matter and having talked about this matter, is there any new leads in this case that have been communicated to you by people who worked on the case after you?

A. There are no new leads to my knowledge.

Q. And that knowledge is based upon communications with your colleagues?

A. Exactly.

MR. WHITE: Okay. Thank you.

THE COURT: Thank you very much, Mr. Blount. You may step down?

THE WITNESS: Thank you.

THE COURT: Anything further from the government?

MR. WHITE: Nothing further, your Honor.

* * *

[p. 284] THE COURT: Mr. Searle, you are still under oath.

THE WITNESS: Yes, sir.

THE COURT: I will permit reopening of the testimony.

DIRECT EXAMINATION

BY MR. WHITE:

Q. Agent Searle, you testified that you have talked to a few people who knew Al Garbett and knew friends of Al Garbett to help make a determination as to whether or not they could tell you whether or not they had communication with those friends that could tell you where Al Garbett was.

Could you tell us again who you talked to and when you talked to them?

A. The first one, the most recent would be Leon Cholakis and Suzanne Voit, mainly just through my contacts, because they are witnesses and it is part of my duties to talk to them and make their arrangements to be here.

Leon was just in the office last week when we asked him if he had had any contact from Al Garbett.

And Suzanne Voit, I am sure that was last week or the week before when I talked to her on the telephone. And the [p. 285] last time before that was when we were getting ready for the last trial

MR. WHITE: Okay. Nothing further.

CROSS EXAMINATION

BY MR. BLACK:

Q. Was a trial subpoena for this trial issued in the name of Allen Garbett?

A. I can't say whether one was actually typed up.

I believe the secretary just typed them all up the same as for the last trial. So there probably was one typed up.

Q. Did you see this subpoena?

A. I can't testify that I actually saw it.

Q. So the answer then is no?

A. There may be one out there.

Q. There may be one out there, but you haven't seen it.

A. Right.

Q. Right?

A. It never came into question whether we actually needed to go to Riverside House to drop off a subpoena there.

Q. Did you go to Riverside House?

A. No.

Q. Did you go to Intercontinental?

A. Actually we went by there on the way in from the airport. And it looks like it is closed down.

Q. Did you go anywhere in the last 6 months looking for Allen [p. 286] Garbett?

A. No, not myself personally.

Q. Now, Leon Cholakis is no longer a relative of Allen Garbett.

Isn't that true?

A. That is correct.

Q. That he had divorced his wife Yvonne years ago.

Isn't that right?

A. It is before my time, but I believe it was years ago, yes.

Q. There is no evidence that Cholakis has had any contact with Allen Garbett for several years.

Isn't that correct?

A. I don't know about that. I was just operating on a hunch that if Al may need some money, maybe Leon may be somebody he might turn to.

Q. When is the last time Leon said he ever heard of or talked to Allen Garbett?

A. I don't know that he did say when the last time was.

I don't know when the last time was. It hasn't been any time recent or since the Harvey Robbins Emanuel Elfenbein trial started.

Q. Has he seen him ever since Garbett went to prison?

A. I couldn't answer that.

Q. Suzanne Voit, isn't it a fact the last time she saw Allen Garbett was in 1989?

[p. 287] A. That would be correct if that is when they testified in the Grand Jury.

Q. Didn't she testify at the last trial the last time she saw him was in the hallway in front of the Grand Jury in approximately 1989?

A. I believe you are correct, yes.

MR. BLACK: All right. Thank you.

MR. GARVIN: Very briefly, your Honor.

CROSS EXAMINATION

BY MR. GARVIN:

Q. And again, sir, you spoke to Leon Cholakis, the primary purpose for speaking to Leon Cholakis was because he is going to be a witness at this trial.

Isn't that correct?

A. Was that my primary purpose for speaking with him?

Q. Yes, sir.

A. Yes, he was contacted because he was going to be a witness.

Q. And Suzanne Voit, the primary purpose for having discussion with Suzanne Voit was because she is going to be a witness in this trial, correct?

A. That has always been my primary contact with them.

But since Al absconded we asked all of them if they have heard from him as well.

Q. So while you were discussing when she should come here for for this trial, you mentioned to her has she heard from Al [p. 288] Garbett?

A. Heard anything about Al, do you know anybody that has had contact with him, whatever.

Q. But would it be fair to say that the primary reason for your discussion with Suzanne Voit was to make arrangements for her to come to this trial?

Is that correct?

A. It is your use of the word primary that I have problems answering that question.

Q. Well, the majority of the time you spent talking to her – .

A. I would have had to call her to get her here for the trial, yes.

MR. GARVIN: Okay. I have no further questions.

REDIRECT EXAMINATION

BY MR. WHITE:

Q. Agent, are you familiar with NCIC?

A. Yes.

Q. And when someone is designated as a fugitive are they automatically put into NCIC?

A. Yes. As a matter of fact I talked with Marshal Blount about this.

When someone is a fugitive their case is assigned to the warrants section. And one of the reasons that Mr. Blount doesn't have it right now is he is not working in the warrants section right now.

[p. 289] It is being worked by people who do nothing but look for people with outstanding warrants.

Q. And when you spoke to Suzanne Voit, had she heard from any mutual friends that she and Allen Garbett had that knew of Al Garbett's whereabouts?

A. No.

Q. When you spoke to Mr. Cholakis did he tell you that any mutual friends that he and Al Garbett had had over the years had communicated with him as to where Al Garbett was?

A. He had not heard anything.

Q. And both Ms. Voit and Mr. Cholakis had worked for Al Garbett?

A. That is true.

Q. In the past.

A. That is true.

MR. WHITE: Thank you.

RECROSS EXAMINATION

BY MR. BLACK:

Q. You have a terminal that can access the NCIC system in your office?

A. Yes.

Q. Did you check it to see what it says about Al Garbett?

A. I didn't check it personally, no.

To be honest, once we found out that the U.S. Marshals were on the case, the brunt of my work was in contact with [p. 290] Deputy Blount to see what was going on, if Al had been found.

I was doing this all from Orlando. But once he was on the case I got out of it.

MR. BLACK: Thank you.

THE COURT: Thank you very much. You may step down, sir.

THE WITNESS: Yes, sir.

* * *